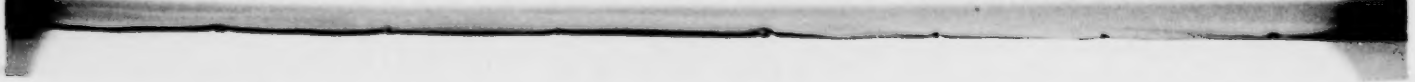

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 125.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois.

RESPONDENT'S BRIEF ON MERITS.

OPINIONS BELOW.

The opinion of the Appellate Court of Illinois, Fourth District, is reported at 351 Ill. App. 272, 114 N. E. (2d) 901, and also appears at pages 15-22 of the Transcript of Record in this cause. The Supreme Court of Illinois denied Leave to Appeal without written opinion (R. 69).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 929 (3) of the Judiciary Act of June 25, 1948 [28 U. S. C. A. 1257 (3)].

HISTORY.

A somewhat extended statement of the course taken by the proceedings in the Illinois Courts is required to adequately explain the statutory provisions, Federal and State, involved in this cause and upon which the jurisdiction of this Court rests.

Petitioner predicates his right of recovery herein solely upon the Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Secs. 22-34), for his Complaint in the Trial Court (R. 23) pleads only Section 2 of said Boiler Inspection Act, and Petitioner is in error in indicating to this Court (Pet. Br. 2) that this cause is brought under the Safety Appliance Act of 1893 (45 U. S. C. A., Secs. 1-16) (See: Urie v. Thompson, 337 U. S. 163, 188, 189, 93 L. ed. 1282, 1302, 1303, for distinction between the "Boiler Inspection" and "Safety Appliance" Acts). The Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) is not now pleaded herein and is not now in issue in this cause, Petitioner having dismissed Count II of his Complaint predicated thereon prior to the selection of the jury that heard this cause (R. 25).

The Trial Court, prior to trial, denied (R. 26) Respondent's Motion, as amended, for a physical examination of the Petitioner, as provided for by Federal Rule of Civil Procedure 35. After the trial such Trial Court denied (R. 30) Respondent's Motion for Directed Verdict at the close of all of the evidence (R. 68), its Motion for Judgment N. O. V. (R. 28) and its alternative motion for a new trial (R. 28-30).

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The Respondent thereupon appealed this cause to the Appellate Court of Illinois, Fourth District, and that Court affirmed (R. 19, 20) the Trial Court denial of a physical examination of said Petitioner and (R. 17, 18) its denial of said Motion for judgment n. o. v., but (R. 21) reversed and remanded this cause for a new trial before another jury, because (R. 19) "the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence." Petitioner then filed a Petition for Rehearing in such Appellate Court and, for the first time, contested, as that Court said (R. 21), "the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence." This Petition for Rehearing was denied (R. 21) in a Supplemental Opinion (R. 21-22).

The portion of the Illinois Appellate Court judgment (R. 21) remanding this cause for a new trial was an interlocutory judgment not reviewable by this court (Urie v. Thompson, 337 U. S. 163, 171, 93 L. ed. 1282, 1293), or by the Illinois Supreme Court on Petition for Leave to Appeal [Section 75 (2) (c), Illinois Civil Practice Act*— Ill. Rev. Stat. 1953, ch. 110, par. 199 (2); Corcoran v. City of Chicago, 373 Ill. 567, 569, 570, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. Ed. 386, rehearing denied 311 U. S. 727, 85 L. Ed. 473).

Petitioner thereupon chose to waive his right (Corcoran v. City of Chicago, 373 Ill. 567, 569) to a new trial before another jury and did not take such new jury trial, as did the plaintiff in the **Urie** case, supra, 337 U. S. 163, 172, 93 L. Ed. 1282, 1293, and voluntarily moved (R. 68), pursuant to said Section 75 (2) (c) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, par. 199 (2)], the Illinois Appellate Court to strike the portion of its judgment

* See page 5 of this Brief for quotation of this statute.

remanding this cause for a new trial, so that the Illinois Supreme Court and this Court (Urie v. Thompson, 337 U. S. 163, 172, 93 L. ed. 1282, 1293, 1294) could review, and perhaps reverse, the resulting and then final Appellate Court judgment.

The Illinois Appellate Court granted (R. 68) such Motion. Petitioner thereupon filed his Petition for Leave to Appeal (R. 1-14) wherein he said "Because this case comes to this [Illinois Supreme] Court, solely on a legal question, that is, does a reviewing court in an action under the Federal Employers' Liability Act or Federal Safety Appliance Act, have the power to hold a jury verdict against the manifest weight of the evidence, there need be but scant reference to the facts."

The Illinois Supreme Court, without written opinion, denied (R. 69) such Leave to Appeal on March 10, 1954. The Petition for Writ of Certiorari was filed herein on June 7, 1954, and was granted on October 14, 1954 (R. 69).

The judgments of the Illinois Courts in this cause are in accordance with the established Illinois modes of practice and procedure, are in accord with the decision of this Court in **Minneapolis & St. L. R. Co. v. Bombolis**, 241 U. S. 211, 60 L. ed. 961, and do not involve, or violate, any substantial Federal right of the Petitioner which invokes the jurisdiction of this Court.

It is important to note that the trial judge who tried this cause and who saw and heard the witnesses reserved (R. 68) his ruling on Respondent's motion for directed verdict at the close of all the evidence (R. 68) and then departed this life before ruling thereon (folio 49). Respondent's said motion for directed verdict, its motion for judgment n. o. v. and its alternative motion for a new trial, were, therefore, denied by another trial judge solely upon the printed record and the arguments and briefs of counsel.

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STATUTES INVOLVED.

Federal.

45 U. S. C. A., Sec. 23—Section 2, Federal Boiler Inspection Act:

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests.
>
> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659."

State.

Ill. Rev. Stat. 1953, ch. 110, par. 199 (2) (c)—[Section 75 (2) (c), Illinois Civil Practice Act], in pertinent part, is as follows:

> "In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses said judgment or decree and remands the cause for a new trial or hear-

ing, and in which the party in whose favor the trial court's judgment or decree was rendered shall present to and file with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it shall be competent for the Supreme Court to grant leave to appeal from said final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section."

Ill. Rev. Stat. 1953, ch. 110, par. 216 (3) (b)—[Section 92 (3) (b), Illinois Civil Practice Act], in pertinent part, is as follows:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only. As amended by act approved July 2, 1947. L. 1947, p. 1349."

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QUESTIONS PRESENTED FOR REVIEW.

1. Does the judgment of the Illinois Appellate Court remanding this cause for a new trial before another jury, under the governing Illinois statute (This Brief 6) permitting it so to do, present a substantial Federal question which invokes the jurisdiction of this Court?

2. Was the writ of certiorari herein improperly addressed to the Illinois Supreme Court so that it should be dismissed for lack of jurisdiction?

3. Does the procedural statute of Illinois (This Brief 5) deprive the plaintiff, in a state court Federal Boiler Inspection Act case, of a substantial Federal right of trial by jury, which will invoke the jurisdiction of this Court, where it permits him to voluntarily move and request such State Appellate Court to strike the portion of its judgment remanding the cause for a new trial before another jury, so that the portion of its judgment reversing such cause becomes final and, therefore, immediately reviewable by the Illinois Supreme Court and by this Court?

4. Whether a State Appellate Court, reviewing a Federal Boiler Inspection Act case, has the power and duty to reverse the judgment therein and to remand the cause for a new trial before another jury, where it finds that the verdict of the jury in such cause is against the manifest or clear weight of the evidence?

5. Does the law of the forum (Illinois) or Federal law control and determine the power and duty of a State Appellate Court to remand a state court Federal Boiler Inspection Act case for a new trial before another jury, where it finds the verdict of the jury in such cause to be against the manifest or clear weight of the evidence?

6. Whether this Court can properly re-examine and pass upon the non-Federal findings of fact of the Illinois Appellate Court in this cause in view of the provisions of Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill. Rev. Stat. 1953, ch. 110, Par. 216 (3) (b)] limiting review by the Illinois Supreme Court on appeal of law actions from such Appellate Court "to questions of law only" and in view of the settled rule of this Court that it will not review non-Federal findings of fact made by state tribunals.

7. If this Court determines that Federal procedural law controls this cause, which Respondent emphatically denies, did the state court refuse Respondent a substantial Federal right in holding that Petitioner did not have to submit to a physical examination, as required by Federal Rule of Civil Procedure 35?

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* Quoted page 6 of this Brief

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STATEMENT OF THE CASE.

The Petitioner, having predicated his right of recovery *herein solely upon a claimed violation of Section 2 of the* Federal Boiler Inspection Act of 1924 (45 U. S. C. A., Sec. 23), had the burden of proving that the trolley retriever was defective and that such defect was the proximate cause of his injury. (**Baltimore & O. R. Co. v. Groeger**, 266 U. S. 521, 527, 69 L. ed. 419, 423; **Zachritz v. St. L. & S. F. Ry. Co.** [1935], 336 Mo. 801, 806-807, 81 S. W. [2d] 608, 611, certiorari denied [1935], 296 U. S. 584, 58 S. Ct. 95, 80 L. ed. 413; **Fryer v. St. L. & S. F. Ry. Co.** [1933], 333 Mo. 740, 749-758, 63 S. W. [2d] 47, 50-55; **Riley v. Wabash Ry. Co.** [1931], 328 Mo. 910, 917-923, 44 S. W. [2d] 136, 138-141; **Harlan v. Wabash Ry. Co.** [1934], 335 Mo. 414, 422, 423, 73 S. W. [2d] 749, 752, 753; **Pryor v. Chicago, R. I. & P. Ry. Co.** [1934], 170 Okla. 158, 162-165, 39 P. [2d] 563, 568-571; **Lynch v. Delaware L. & W. R. Co., 2 Cir.** [1935], 58 F. [2d] 177; **Ehalt v. McCarthy** [Utah, 1943], 138 P. [2d] 639, 642-646; **Camp v. Atlantic Coast Line R. Co.** [Alabama, 1948], 36 So. [2d] 331, 335.)

Petitioner recognized that it was necessary to allege and prove a defect, for he pleads an alleged "defective" retriever in paragraphs 6, 9 and 10 of his Complaint (R. 23, 24).

The facts in the case at bar are correctly stated in the opinion of the Illinois Appellate Court (R. 15-22, 351 Ill. App. 272, 114 N. E. 2d 901) and will be here quoted only as they relate to the purpose and normal operation of, and to an alleged defect in, such retriever and to correct certain unfounded statements appearing in Petitioner's Statement of the Case (Pet. Br. 5).

The purpose and normal operation of the retriever, of a type used by Respondent for over 20 years (R. 57), is

described by the Illinois Appellate Court as follows (R. 15-16):

> "Defendant operates an electric interurban line from Alton, Illinois, to St. Louis, Missouri. Trolley poles connect with an overhead power line in the normal fashion and are retracted automatically to a horizontal position on top of the car if the pole should slip off the power line. The mechanism by which the pole is thus retracted is called a 'retriever' and its alleged failure to operate properly is the basis of plaintiff's action. The retriever is an intricate device composed of powerful springs that are wound and set as the trolley pole rope is pulled out to put the pole in contact with the power line. Then if contact with the power line is broken and the rope suddenly jerked by the trolley springing free, the retriever is activated and causes the rope to be automatically and quickly rewound into the retriever, bringing the pole down to the top of the car. A retriever is located at both ends of the trolley car to control the trolley pole at that end. To 'set' a retriever requires a careful pulling of the trolley rope out of the retriever until the retriever springs are fully wound and a catch takes hold keeping the springs tightly wound. Any jerk of the line as the trolley is then allowed to ascend to make contact with the powerline, or a failure of the catch to hold the spring tension, will result in the line being quickly and powerfully rewound.
>
> "On April 25, 1950, plaintiff was the conductor on the first car of a three-car train pulling into the St. Louis depot two to four minutes late. As the cars crossed a switch, the rear trolley on plaintiff's car jumped the track and he climbed out to reset it. Plaintiff testified that he pulled out the rope in the usual fashion and set the retriever; then with the tension from the retriever springs off the rope, he permitted

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it to slide slowly through his hands to bring the pole into contact with the power line; that suddenly the retriever operated, jerking the plaintiff between the two cars, injuring his back.

"Plaintiff alleges that the retriever was defective and that the defendant's failure to keep the said retriever in a safe condition for his use constituted a violation of the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23)."

To show the existence of the claimed defect Petitioner makes the following statements in his Statement of the Case (Pet. Br. 5):

"If the trolley were slowly permitted to ascend, then it is agreed that the retriever, if properly operating, should not retrieve (R. 49).

"Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 32). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 32). * * *"

The following language of the Illinois Appellate Court, to which Respondent has added references to the pages of the Record in this Court, shows the falsity of the above statements made by Petitioner with respect to the retriever (R. 18, 19):

"However, with respect to the existence of the alleged defect, certain undisputed facts were established by the evidence. Plaintiff himself testified that before the run back to Alton was started, he saw the motorman set the pole that plaintiff had left in the retrieved position under the hook on top of the car, and that he presumed the retriever was reset at that

time. (See: R. 44.) Further, on the cross-examination of the mechanical engineer who gave opinion evidence on plaintiff's behalf as to possible defects in the retriever which would cause it to retrieve unexpectedly, it was stated that these same defects would prevent the retriever from operating normally [fol. 26] at all. (See: R. 52.) Yet the evidence shows that the retriever operated normally before and after the incident complained of. (See: R. 31, 44.) In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. (See: R. 42, 44, 53, 58.) The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record."

It is particularly to be noted that Petitioner is a conductor on the interurban electric cars operated by Respondent (R. 30) and was familiar with and had operated retrievers during the entire six-year period of 1944-1950 (R. 31, 43); that it is the duty of the conductor to change the trolleys and to set the retrievers at the end of each

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hourly run between St. Louis, Missouri, and Alton, Illinois, and to also set such retrievers, at times, during the course of the trip (R. 31, 43); that Petitioner, himself, testified on direct examination:

> (R. 32)—I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and for some reason it caught and rewound and when it did it yanked me in between the cars. Then it was just like someone hit me and I had a terrible pain all the way down my head and back and sickening. I tried to pull it out and I couldn't. I was sick and felt like vomiting, and I reached over the coupler with my other hand and set the other pole up and proceeded into the station. You have to set these retrievers very slowly because after you have used them you know what they will do. You know they will jerk your head off if you don't watch them. You have to work with them cautiously and slowly and carefully, but I was working slowly because I knew if I worked fast or any other way that it would retrieve.

and that he testified on cross-examination as follows:

> (R. 43)—In the operation of the streetcar on numerous occasions I operated the retriever and oper-[fol. 73] ated the particular retriever on this streetcar on other occasions. I have had this situation happen to me on other occasions, on several occasions. I wouldn't give you a definite number of times, that is silly, I could give you an estimate, but it is silly to say it happened to me 10 times if I can't say it would be more than 10 times, but it would be a number of times, not to me only, but to everybody. During my daily run, the number of times that I would handle a retriever would depend on the run. The conductor changes trolleys at each end of the run. He pulls one

down and puts the other one up, and during the course of the trip you may loose it once, may not loose it at all, and may loose it a half a dozen times. And on other occasions this thing has happened. I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. On occasions that this would happen, sometimes it would wind itself up and you start to reset it you are ducked away while you are pulling it. All of a sudden it will take you on in. It is supposed to work on a ratchet. This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers.

(R. 44)—I was pulling the pole up slowly when it slipped again and the pole came down the trolley. When it tripped it pulled me along and I held onto it. This was the same thing that has happened to me on other occasions.

The Petitioner also states (Pet. Br. 8):

> Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

This statement is wholly untrue, as pages 55-59 of the Record will show. On this issue Mr. Elder actually said (R. 58): "The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have."

Raymond Phillips, a motorman employee (R. 53), stated that:

> I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be hold-

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ing on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I brake [break] myself.

James LeRoy Green, a conductor employee for about 7½ years (R. 59), said (R. 61), "I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go."

In order to create the false impression that the incident in question in this cause created an "emergency" situation, Petitioner says (Pet. Br. 5): "This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 32)." This statement entirely overlooks the testimony of motorman Charles Elder that (R. 56) "it didn't make a bit of difference" and that (speaking of the subway at the St. Louis, Missouri, Depot)—(R. 57) "We run our cars in the subway like that down there. We don't run our main lines that way, we do in that subway, we back any way we want to. I recommend backing against the pole; we do that down there. I change the poles. The train end of the car was in the subway. It wouldn't make a bit of [fol. 122] difference about resetting the poles, he didn't have anything to explain or didn't tell me anything or I didn't ask him anything."

The full pertinent testimony of Petitioner's mechanical engineer witness, part only of which is quoted on page 22 of his Brief on Merits, is as follows (R. 51, 52):

"Mr. Chapman: Q. Now, if the retriever, Mr. Kline, were to go into operation after it had been set on slow

pulling out of the rope and retriever what, in your opinion, would be the cause of the defect, might or could cause that situation?

Mr. Schuman: That is objected to, for the same reason, asking for pure conclusion.

Mr. Chapman: I think not. He qualified as an expert and he examined it.

The Court: He may give his opinion as an expert.

A. My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main [fols. 85-96] reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning.

Q. And could there be a defect in one of those springs; is that what you are saying?

A. Yes, sir; there could be a defect in one of those springs, or it would slip out.

Cross-Examination.

I am a mechanical engineer at the American Steel Foundry, and my title there is special engineer. I do all type of research work. On August 20, 1951, was the first time I had ever seen a retriever on a streetcar. At the time of the operation of the retriever, I used a rope and had it fastened in a vise. I couldn't pull it up or down. It would be a normal operation, but not in a normal position, the way I had it, as to the way it worked on a streetcar. I have never worked on a retriever on a streetcar, and the retriever I saw there was a Paul Warren.

Q. And were the springs broken?

A. No, sir.

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Q. Now, **if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally,** if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?

A. No, sir." (Emphasis supplied.)

Petitioner's reference (Pet. Br. 6) to a Report of his injury "which was placed in evidence as Petitioner's Exhimit I," without the record reference required by Rule 40 (2) of this Court, is wholly improper, since such Exhibit does not appear in the Record of this cause in this Court. Respondent requests this Court to disregard such improper statement and the "self-serving" conclusions drawn by the Petitioner therefrom.

SUMMARY OF ARGUMENT.

1. The jurisdiction of this Court in this Federal Boiler Inspection Act cause can be invoked only if the law of Illinois has deprived the Petitioner of a substantial Federal right. The only claimed Federal right asserted by Petitioner is that the Illinois Appellate Court deprived him of a substantial Federal right of trial by jury in remanding this cause for a new trial before another jury, because the verdict of the jury for the Petitioner was against the manifest or clear weight of the evidence on the issue of a defective retriever, after such Illinois Appellate Court had found that Petitioner's evidence, taken as true, had sufficient probative force to require all the issues to be submitted to the jury, so that a directed verdict or judgment n. o. v. would not lie.

The Seventh Amendment to the Constitution of the United States does not apply to Federal Act state court proceedings, is not in issue in this cause and has not been invoked by Petitioner. Section 5 of Article II of the Illinois Constitution, however, preserves the same common law right of trial by jury, even though Illinois is not required so to do.

The Illinois Appellate Court, in reversing this cause and remanding the same for a new trial, preserved to Petitioner the right of trial by jury. Petitioner elected to forego and waive this right to a new jury trial and, under the governing Illinois Statute (This Brief 5), voluntarily moved the Illinois Appellate Court to strike the portion of its judgment remanding this cause for a new trial, so that the Illinois Supreme Court and this Court could review the resulting and then final Illinois Appellate Court judgment. It was, therefore, Petitioner's own actions and conduct and not Illinois law that deprived him of a trial by jury.

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In **Corcoran v. City of Chicago**, 373 Ill. 567, 27 N. E. 2d 451, which presented the identical procedural matters involved in this cause, the Illinois Supreme Court held that the Illinois Statute (This Brief 6), under which the Illinois Appellate Court remanded this cause for a new trial, did not violate the right of jury trial guaranteed by said Section 5 of Article II of the Illinois Constitution.

And in **Corcoran v. City of Chicago**, 311 U. S. 610, 85 L. Ed. 386, rehearing denied 311 U. S. 727, 85 L. Ed. 473, this Court dismissed the appeal of such case "for want of a properly presented substantial Federal question," citing, with seven of its other decisions, **Minneapolis & St. L. R. Co. v. Bombolis**, 241 U. S. 211, 217, 60 L. Ed. 961, 963. This controlling **non-Federal** question is not even raised by Petitioner.

Respondent, therefore, contends that this cause presents no Federal question at all, much less a "substantial" Federal question which will invoke the jurisdiction of this Court.

Moreover, the writ of certiorari herein is improperly addressed to the Illinois Supreme Court and should be dismissed for lack of jurisdiction.

2. The Petitioner relies only upon directed verdict and judgment n. o. v. decisions, in arguing that the Illinois Appellate Court erred in remanding this cause for a new trial. This fallacious contention makes it necessary for Respondent to briefly point out the following elementary principles of law, uniformly followed in the Federal and Illinois Courts:

> (a) That in passing upon a defendant's motion for a directed verdict or judgment n. o. v. the Court cannot consider the credibility of witnesses or the weight and probative value of the evidence, but must consider

such evidence in its aspect and light most favorable to plaintiff, with all conflicts in evidence resolved in his favor.

(b) That in passing upon a defendant's motion for a new trial the Court has the right and duty to consider the credibility of witnesses and the weight and probative value of the evidence and to determine whether the verdict of the jury is against the weight of the evidence.

An appreciation and acceptance of these elementary principles by the Petitioner would have materially shortened this Brief and expedited the disposition of this cause.

3. The remand of this cause for a new trial by the Illinois Appellate Court was a matter of local procedure governed entirely by Illinois law (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961).

4. Under Illinois law and by the common law, courts exercising appellate jurisdiction have the power to remand a cause for a new trial, where the verdict of the jury is against the weight of the evidence.

5. The settled rule of this Court is that it and the Circuit Courts of Appeal have the power to remand a cause for a new trial where the record shows a plain abuse of discretion by the Federal Trial Judge or a finding of fact wholly unsupported by the evidence.

The Courts of Appeal for the Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuits and for the District of Columbia have squarely held that they have the power to review an abuse of discretion by a Federal Trial Judge in refusing a new trial. In several of these cases this Court has denied certiorari (This Brief 54).

Respondent is of the firm opinion that the case at bar, on the issues presented to this Court, is governed entirely

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by Illinois law. However, the above Federal rule is argued out of an abundance of caution.

6. The Illinois Appellate Court properly found that the verdict of the jury was against the manifest or clear weight of the evidence on the issue of a defective retriever. And this Court has repeatedly said that it will not review non-Federal findings of fact, but will accept the conclusion of the state tribunal as final.

7. If this Court determines that Federal rules of procedure govern this cause then the Illinois Appellate Court deprived the Respondent of a substantial Federal right by its refusal to require the Petitioner to submit to a physical examination.

ARGUMENT.

I.

Want of a Substantial Federal Question and Lack of Jurisdiction.

A.

This Cause Does Not Present a Substantial Federal Question Which Invokes the Jurisdiction of This Court.

The Seventh Amendment to the Constitution of the United States applies only to Federal Court proceedings (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242). However, the Illinois Constitution (Section 5 of Article II) preserves the right of trial by jury as it existed at the common law. (Corcoran v. City of Chicago, 373 Ill. 567, 575, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473; Reese v. Laymon [1954], 2 Ill. 2d 614, 618). Illinois, therefore, gives to an F. E. L. A. or Federal Boiler Inspection Act plaintiff, suing in its Courts, the same right of common law jury trial given by said Seventh Amendment, although it is not required so to do.

At common law courts of original jurisdiction and courts **exercising appellate jurisdiction** were both authorized to set aside jury verdicts and to grant or order a new trial on the ground that the findings of fact of such juries were not supported by the evidence. And the exercise of such power and authority was not in derogation of the right of trial by jury as it existed at common law.

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Illinois decisions:

Corcoran v. City of Chicago, 373 Ill. 567, 575-580, 27 N. E. 2d 451, appeal dismissed 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473—reviews common law authorities, cites and quotes (pp. 577-578) **Bright v. Eynon** (King's Bench, 1757), 1 Burrows, 391, and cites (p. 580) **Smith v. Times Publishing Co.**, 178 Pa. St. 481, 36 Atl. 297;

Olson v. Chicago Transit Authority, 1 Ill. 2d 83, 85, 86.

Federal decisions:

Aetna Casualty & Surety Co. v. Yeatts (4 Cir., 1941), 122 F. 2d 350, 352-354 Parker, J.), citing Felton v. Spiro (6 Cir.), 78 F. 576;

Virginian Ry. Co. v. Armentrout (4 Cir., 1948), 166 F. 2d 400, 408 (Parker, J.);

Garrison v. United States (4 Cir., 1932), 62 F. 2d 41, 42 **citing: Felton v. Spiro** (C. C. A. 6th), 78 F. 576; Mt. Adams & E. P. Inclined R. Co. v. Lowery (C. C. A. 6th), 74 F. 463;

Felton v. Spiro (6 Cir., 1897), 78 F. 576.

Section 92 (3) (b) of the Illinois Civil Practice Act* [Ill Rev. Stat. 1953, Ch. 110, par. 216 (3) (b)], giving the Illinois Appellate Courts the power to review "Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence," merely codifies and re-states the above common law rule as it applied to common law courts exercising appellate jurisdiction and does not violate the Illinois Constitution [Corcoran v. City of Chicago, 373 Ill. 567, 580, 27 N. E. (2d) 451; Mabee v. Sutliff & Case Co., 404 Ill. 27, 88 N. E. (2d) 769].

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* Quoted page 6 of this Brief.

In the **Corcoran** case, supra, 373 Ill. 567, the Illinois Supreme Court stated the Illinois constitutional question there presented in the following language:

> p. 569—"It is conceded the power which the Appellate Court assumed to exercise in reviewing the evidence and setting aside the verdict is found in section 92 (3b) of the Civil Practice Act (Ill. Rev. Stat. 1939, chap. 110, par. 216) which provides that Appellate Courts may review 'error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence.' Plaintiff's position is that such provision, as applied to facts found by a jury upon conflicting evidence, as in the instant case, is unconstitutional, in that the findings of the Appellate Court deprive the successful party of the benefits of the verdict and take from him the right to a trial by jury as guaranteed by section 5 of article 2 of the constitution."

and thus stated the real **non-Federal** question involved in this cause. This real non-Federal question was not even presented to the Illinois Supreme Court in Petitioner's Petition for Leave to Appeal (R. 1-14), or in his Petition for Writ of Certiorari in this Court (Pet. 2), or in his Brief on Merits in this Court (Br. 3), and it is the settled rule of this Court that **even a Federal question**, constitutional or otherwise, must be presented to the State Court before it will be reviewed and considered by this Court. (White River Lumber Co. v. Arkansas, 279 U. S. 692, 700, 73 L. ed. 903, 911; Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 344, 64 L. ed. 601, 605; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 59 L. ed. 127, 128).

Moreover, since the Seventh Amendment to the Constitution of the United States does not apply to state court proceedings (Pearson v. Yewdall, 95 U. S. 294, 296, 24 L.

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ed. 436, 437; Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242). Petitioner could not properly have raised a Federal constitutional right to jury trial question even if he had wanted to.

Respondent stresses that the **Corcoran** case, supra, 373 Ill. 567, presents the identical non-Federal procedural matters involved in this cause, i. e., (1) the Illinois Appellate Court, under the identical governing statute (this Brief 6), remanded for a new trial because the verdict of the jury was against the manifest weight of the evidence and (2) the plaintiff in that case voluntarily moved the Illinois Appellate Court, under the identical governing Illinois Statute (this Brief 5), to strike the portion of its judgment remanding that cause for a new trial, so that the Illinois Supreme Court and this Court could review the resulting and then final Appellate Court judgment in that cause.

In **Corcoran v. City of Chicago**, 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed. 473, this Court dismissed the appeal of the **Corcoran** case, supra, from the Illinois Supreme Court "for want of a properly presented substantial Federal question," citing, with seven of its other decisions, the **Bombolis** case, supra, 241 U. S. 211, 217, 60 L. ed. 961, 963. For the same reason this Court should dismiss the writ of certiorari issued in this cause.

B.

The Writ of Certiorari Herein Is Improperly Addressed to the Illinois Supreme Court and Should Be Dismissed for Lack of Jurisdiction.

Additional reason for the dismissal of this cause is the fact that, contrary to long and well-settled practice, the writ of certiorari herein is addressed to the Supreme Court

of Illinois, not to the Illinois Appellate Court, Fourth District, whose decision is sought to be reviewed.

Under 28 U. S. C., Sec. 1257, the jurisdiction of this Court to review by certiorari decisions of state courts is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had."

Under Section 75 of the Illinois Civil Practice Act* (Ill. Rev. Stat. 1953, Ch. 110, Par. 199) a final judgment of the Illinois Appellate Court, such as the final judgment there entered in this cause, is reviewable only by petition to the Illinois Supreme Court for leave to appeal (formerly petition for writ of certiorari), which such Supreme Court may, in its discretion, allow or deny (it was denied in this cause).

In **Minneapolis, etc., Ry. Co. v. Rock**, 279 U. S. 410, 73 L. ed. 766, this Court held that where the Supreme Court of Illinois denied a review of the Illinois Appellate Court judgment, the writ of certiorari from this Court runs to such Appellate Court as "the highest court in the state in which a decision could be had." Since the **Rock** case, supra, the practice has become firmly settled that when the Supreme Court of Illinois has denied leave to appeal, the Appellate Court is the court whose final judgment is sought to be reviewed, and the writ of certiorari from this Court must be directed to the Appellate Court. **Lilly v. Grand Trunk W. Ry. Co.**, 317 U. S. 481, 87 L. ed. 411; **Chicago & N. W. Ry. Co. v. Margevich**, 75 S. Ct. 84, 99 L. ed. (Adv. Sheet No. 1), p. 46; **Emick v. Baltimore & O. R. Co.**, 340 U. S. 831, 95 L. ed. 611; **Killian v. Pennsylvania R. Co.**, 338 U. S. 819, 94 L. ed. 497; **Cowher v. Pennsylvania R. Co.**, 338 U. S. 828, 94 L. ed. 503; **Thomson v. Sevier**, 317 U. S. 698, 87 L. ed. 558; **Helton v. Thomson**, 316 U. S. 688, 86 L. ed. 1760. This is also the settled practice upon certiorari by this Court to other states having intermediate

* Quoted page 5 of this Brief.

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appellate courts, with a discretionary review by the Supreme Court of the state. See the cases cited in notes 18 and 19 to 28 U. S. C. A., Sec. 1257.

Here the judgment of the Illinois Appellate Court as originally entered, reversed the judgment in Petitioner's favor and remanded this cause for a new trial (R. 21, folio 149). That judgment, not being final, was not subject to further review, either by the Supreme Court of Illinois or by this Court. **Lees v. Chicago & N. W. Ry. Co.**, 409 Ill. 536, 541; **Avance v. Thompson**, 323 U. S. 753, 89 L. ed. 603. Instead of trying his case before another jury, and remedying any deficiencies in his proof, as he might have done without losing any right to review any properly preserved federal question presented by the first appeal, **Urie v. Thompson**, 337 U. S. 163, 93 L. ed. 1282, plaintiff **on his own motion**, under said governing Illinois Statute (this Brief 5), obtained an order of the Illinois Appellate Court striking said remanding clause, thus making the judgment of that court final for purposes of further review (R. 68). The Illinois Supreme Court's discretionary denial of the petition for leave to appeal from that judgment merely confirms that the Illinois Appellate Court was "the highest court of the state in which a decision could be had."

Petitioner's error in seeking a writ of certiorari to the Supreme Court of Illinois (which neither entered the final judgment nor decided the case on its merits) is not merely a procedural irregularity; it is a fatal jurisdictional defect. This Court squarely so held in **Randall v. Board of Commissioners**, 261 U. S. 252, 67 L. ed. 637. In that case the Appellate Court of Indiana affirmed the judgment of the trial court, and the Supreme Court of Indiana denied a petition to transfer, procedurally the same as the Illinois petition for leave to appeal. **Randall v. Board of Commissioners**, 77 Ind. App. 320, 131 N. E. 776. This Court dismissed a writ of error to the Supreme Court of Indiana on the ground that "clearly, it should have been to the State

Appellate Court." To the same effect are **Western Union Telegraph Co. v. Priester**, 276 U. S. 252, 258, 72 L. ed. 555, 564, and **Chesapeake & O. Ry. Co. v. Kuhn**, 284 U. S. 44, 76 L. ed. 157, where writs of certiorari to the state supreme courts were dismissed under similar circumstances, and **Second Nat'l Bank v. First Nat'l Bank**, 242 U. S. 600, 61 L. ed. 518; **Michigan-Wisconsin Pipe Line Co. v. Calvert**, 347 U. S. 157, 160, 98 L. ed. 583, 588.

The petition for writ of certiorari herein "to review the judgment of the Supreme Court of the State of Illinois, entered in this case on March 10, 1954" (Pet., p. 1), which is merely the order denying leave to appeal (R. 69), seeks a review of an order which is not a final judgment, and seeks a writ directed to a court in which a decision could **not** be had, since that court, in its discretion, had refused to consider and decide this case. Respondent submits this Court has no jurisdiction of this cause under 28 U. S. C. 1257 and the writ of certiorari herein should be dismissed for lack of jurisdiction. To hold otherwise is to disregard both the clear provision of the Judicial Code and the long-established precedents governing certiorari procedure.

II.

Distinction Between the Rule Governing the Granting of a Directed Verdict or Judgment n. o. v. and the Rule Governing the Granting of a New Trial.

Petitioner persists in citing and arguing "directed verdict" and "judgment n. o. v." decisions, instead of the pertinent "new trial" decisions, in contending that the Illinois Appellate Court deprived him of a substantive [substantial] Federal right, in remanding the case at bar for a new trial, because the verdict of the jury was against the manifest weight of the evidence, after it had found that Petitioner had made a submissible jury case, so that a directed verdict or judgment n. o. v. would not lie. For this reason

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a review of the settled principles of law governing such matters is necessary.

a. **Rule Governing Directed Verdicts and Judgments n. o. v.**

The settled rule of this Court (Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 524, 69 L. ed. 419, 422, 45 S. Ct. 169; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 70 L. ed 1041, 1045; Gunning v. Cooley, 281 U. S. 90, 94, 74 L. ed. 720, 724; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 343, 77 L. ed. 819, 824, 825; Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 85 L. ed. 147, 152, 153, 61 S. Ct. 189) governing "directed verdicts" is stated in the **Groeger** case, supra, in the following language:

p. 524 of 266 U. S., p. 422 of 69 L. ed.:

"The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury, and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding."

and in the **Chamberlain** case, supra, in the following language:

p. 343 of 288 U. S., pp. 824, 825 of 77 L. ed.:

. . . "It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Pleasants v. Fant, 22 Wall.

116, 120, 121, 22 L. ed. 780, 782. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' Gunning v. Cooley, 281 U. S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; Patton v. Texas & P. R. Co., 179 U. S. 658, 660, 45 L. ed. 361, 363, 21 S. Ct. 275. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' (Citations omitted.) The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned." (Citations omitted.)

The same rule prevails in the Federal Courts of Appeal (Burcham v. J. P. Stevens & Co., 4 Cir., 1954, 209 F. 2d 35, 37; Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172; Swift & Co. v. Morgan & Sturdivant, 5 Cir., 1954, 214 F. 2d 115, 116; Pearl Assurance Co. v. Southern Wood Products Co., 5 Cir., 1954, 216 F. 2d 135, 138; Lloyd v. Thomas, 7 Cir., 1952, 195 F. 2d 486, 489; Willits v. Yellow Cab Co., 7 Cir., 1954, 214 F. 2d 612, 615; State of Washington v. United States, 9 Cir., 1954, 214 F. 2d 33, 40, 41), and a most complete statement of such Federal rule is found in the last-cited case of **State of Washington v. United States.**

The true Federal rule governing motions for judgments n. o. v., as distinguished from the Federal rule governing new trials, is concisely stated in the recent F. E. L. A. case of **O'Day v. Chicago River & Indiana Railroad Com-**

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pany, 216 F. 2d 79, decided by the Seventh Circuit Court of Appeals on November 13, 1954. In that case the District Court had rendered a judgment n. o. v. for the defendant railroad because the Trial Judge believed the (p. 82) "Plaintiff's story was fantastic. He impressed the Court as anything but a truthful witness." The Court of Appeals reversed such judgment n. o. v. (p. 83) "with directions that it be vacated, without prejudice, however, to the right of the District Court to rule upon defendant's motion for a new trial," for the reason that on considering a motion for judgment n. o. v. the jury (p. 82) "was the judge of the credibility of the witnesses, not the court." The Court stated the rule governing judgments n. o. v. in the following language:

> p. 82—"The rule is well established that a motion for a judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered together with all reasonable inferences most favorable to plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Sivert v. Pennsylvania R. Co., 7 Cir., 197 F. 2d 371, 375; Marsh v. Illinois Central R. Co., 5 Cir., 175 F. 2d 498, 499; Bonnier v. Chicago, B. & Q. R. Co., 2 Ill. 2d 606, 607-608, 119 N. E. 2d 254. The Federal Employers' Liability Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.'"

This case clearly holds that in passing upon a motion for judgment n. o. v. the Court cannot weigh the evidence or judge the credibility of witnesses, but recognizes that in passing on a motion for a new trial the Court has the duty to weigh the evidence and judge the credibility of witnesses.

The same rule prevails in the Illinois Supreme Court (Wiik v. Hagen, 410 Ill. 158, 161; Lake v. Seiffert, 410 Ill. 444, 448). And that Court, in **Pitrowski v. N. Y. C. & St. L. R. R. Co.**, 4 Ill. 2d 125, decided November 15, 1954, in reversing the First District Appellate Court, because it had held that the Trial Court erred in refusing to direct a verdict for the defendant railroad in a F. E. L. A. case, and in remanding the cause with directions to consider other errors not considered upon the initial review of the case, summarized the pertinent F. E. L. A. decisions of this Court.

In the very recent F. E. L. A. case of **Bonnier v. C. B. & Q. R. R. Co.** (1954), 2 Ill. 2d 606, the same Court said:

> pp. 607-608—"The well-established rule in both the Federal courts and the courts of Illinois is that a motion for judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered, together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. (**Wilkerson v. McCarthy**, 336 U. S. 53, 93 L. ed. 497; **Lindroth v. Walgreen Co.**, 407 Ill. 121; Ill. Rev. Stat. 1951, chap. 110, par. 259.22)."

And in **Williams v. N. Y. Central R. R. Co.**, 402 Ill. 494, decided in 1949, the same court, in reaching the conclusion that the same First District Appellate Court had erroneously entered a directed verdict judgment in favor of the defendant railroad, in a suit brought under the F. E. L. A. (45 U. S. C. A., Sec. 51, et seq.) and the Federal Safety Appliance Act (45 U. S. C. A., Secs. 1-16), thoroughly reviewed (pp. 500-508) the F. E. L. A. decisions of this Court.

The foregoing F. E. L. A. decisions clearly show that the Illinois Supreme Court is fully aware of and has fol-

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lowed the decisions of this Court governing the review of directed verdicts in F. E. L. A. cases.

The same rule as to directed verdicts also prevails in the Fourth District Appellate Court which reviewed this cause (Heimsoth v. Falstaff Brewing Corp. (1953), 1 Ill. App. 2d 28, 30; Walton v. Greenberg Merc. Corp. (1953), 1 Ill. App. 2d 99, 101), and even a cursory examination of its decisions in **Robson v. Pennsylvania R. Co.** (1949), 337 Ill. App. 557, 572-575 (quoting and following Williams v. New York Central R. Co., 402 Ill. 494), and in **Robertson v. Louisville & N. R. Co.** (1945), 327 Ill. App. 44, 52, 53, shows that it, also, is fully aware of and has followed the decisions of this Court governing the review of directed verdicts in F. E. L. A. cases.

b. **Rule Governing New Trials.**

In **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189, this Court, in discussing the distinction between a motion for a judgment n. o. v. and a motion for a new trial, said:

p. 251 of 311 U. S., p. 153 of 85 L. ed.:

"Each motion, as the rule recognizes [Rule 50 (b), F. R. C. P.], has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim **that the verdict is against the weight of the evidence**, that the damages are excessive, or that, for other reasons, **the trial was not fair to the party moving;** and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." (Emphasis supplied.)

In **Snead v. New York Central Railroad Company,** 4 Cir., 1954, 216 F. 2d 169, that Court, speaking through Chief Judge Parker, made the same distinction in the following language:

> p. 172—" 'It is well settled that on a motion for a directed verdict or on motion for judgment n. o. v. based on such motion, the evidence must be considered in the light most favorable to the party against whom the directed verdict or the judgment n. o. v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn.' Burcham v. J. P. Stevens & Co., 4 Cir., 209 F. 2d 35, 37. The rule differs from that applicable on motions for new trial, where the judge may and should set aside the verdict and grant a new trial where the verdict is contrary to the weight of the evidence, or in his opinion is based upon evidence that is false or where he thinks such action necessary to prevent a miscarriage of justice. We pointed out the distinction in Garrison v. United States, 4 Cir., 62 F. 2d 41, 42, from which we quoted in the later cases of Roedegir v. Phillips, 4 Cir., 85 F. 2d 995, 996, and Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F. 2d 350, 354, as follows:
>
> "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be suf-

ficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro, 6 Cir., 78 F. 576. Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." . . .

p. 173—"If the judge is of opinion that the verdict of the jury was against the weight of the evidence or based on evidence that was false, he should set it aside and grant a new trial, even though direction of a verdict or judgment n. o. v. was not warranted." . . .

c. **Summary.**

The foregoing "directed verdict" and "judgment n. o. v." decisions of this Court, of the Federal Courts of Appeals and of the Illinois Supreme and Appellate Courts make it clear that, in determining whether the Petitioner herein had made a submissible case for the jury, so that a directed verdict or judgment n. o. v. should not have been entered, the Trial Judge and the Illinois Appellate Court had no right to pass upon the "credibility of witnesses" or "the weight and probative value of evidence" (Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 524, 69 L. ed. 419, 422, 45 S. Ct. 169); and that Petitioner's evidence had to "be considered in the light most favorable to" [him], "that any conflict in evidence [had to] be resolved

in his favor and that every conclusion or inference that [could] be legitimately drawn therefrom in his behalf [was to] be drawn" (Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172).

However, the foregoing "new trial" authorities make it equally clear that in determining the Respondent's right to a new trial such Illinois Trial Judge and such Illinois Appellate Court had the clear right and duty to pass upon the credibility of witnesses and the weight and probative value of the evidence and to determine whether the verdict of the jury was against the weight of the evidence (Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 251, 85 L. ed. 147, 153; Snead v. New York Central Railroad Company, 4 Cir., 1954, 216 F. 2d 169, 172; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 1941, 122 F. 2d 350, 352-354).

The opinion of the Appellate Court in the case at bar shows that such Court fully understood and carefully followed the foregoing principles of law, for in its infrequent "Supplement to Opinion on Denial of Petition for Rehearing" it first said (R. 21, pp. 282-283 of 351 Ill. App.):

> "On petition for rehearing plaintiff contests, for the first time, the power of a reviewing court to consider the weight of the evidence in F. E. L. A. cases and to reverse and remand a judgment as against the manifest weight of the evidence. It is contended that once such court determines that there is sufficient evidence in the record to support submitting the issues to a jury, it has exhausted its function with respect to weighing the judgment against the evidence. Numerous cases are cited and relied upon, principally, Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916; Ellis v. Union Pacific Railroad Co., 329 U. S. 649, 91 L. Ed. 572; Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, 88 L. Ed. 520; Williams v.

New York Central Railroad, 402 Ill. 494, 84 N. E. 2d 399; Nickell v. B. & O. R. Co., 347 Ill. App. 202, 106 N. E. 2d 738. **All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of evidence.**" (Emphasis supplied.)

and, in rejecting such contention, then said (R. 21, 22, pp. 282-283 of 351 Ill. App.):

"The opinion of the court in the case at bar notes the fact that the evidence of an incident occurring and injury therefrom was highly contradicted but that these issues relate to the credibility of witnesses and were decided by the jury in plaintiff's favor. Such finding, therefore, was not disturbed. On the issue of the existence of a defective appliance, this court did not weigh conflicting evidence, consider the credibility of the various witnesses, nor follow what is considered a more reasonable inference. It considered only undisputed facts and circumstances. These facts were not susceptible of varying inferences but constitute a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever. (fol. 30-38) Plaintiff has cited no authority, and we find none, which **removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence.** The cases cited do illustrate the reluctance of the reviewing courts to disturb findings on issues that are based on credibility of witnesses. We find in these authorities, however, no such restrictive rule of law as urged by plaintiff." (Emphasis supplied.)

From the above-quoted language it is obvious that on the issue of the existence of a defective retriever the Ap-

pellate Court did not find it necessary to weigh "conflicting evidence, consider the credibility of the various witnesses, nor follow what it considered a more reasonable inference" but that it "considered only undisputed facts and circumstances" which "were not susceptible of varying inferences but constituted a manifest weight of evidence in opposition to the claim of a defective or unsafe retriever" (R. 22).

It is also significant that petitioner raised this question only after such Appellate Court had reversed and remanded for a new trial; and that in this Court, also, he has cited no authority "which removes the reviewing court's historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence" (R. 22).

III.

The Appellate Court Had the Power to Remand the Case at Bar for New Trial Under the Settled Illinois Law Governing This Cause.

Before citing and discussing the Illinois and Federal authorities and rules governing appellate review of judgments and orders granting and refusing new trials it is to be noted that under Illinois law (**Ogdon v. Gianakos**, 415 Ill. 591, 595, 596, 114 N. E. (2d) 686; **Parthun v. Elgin, J. & E. Ry. Co.** (1st, 1945), 325 Ill. App. 408, 411, 60 N. E. [2d] 464, **appeal denied**, 326 Ill. App. xv) and under Federal law (**Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) the granting or refusing of a new trial is a matter of procedure and the last-cited Federal cases also squarely hold that Federal courts are not in any way subject to the rules of state practice governing new trials.

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The Illinois Supreme Court has heretofore, in effect, ruled on the point under discussion by its denial of leave to appeal, 326 Ill. A. xv, in the case of **Parthun v. Elgin, J. & E. Ry. Co.** (1945), 325 Ill. A. 408, 60 N. E. (2d) 464, wherein the First District Appellate Court, in squarely holding that it had the right, **under the governing state practice,** to grant a new trial in a F. E. L. A. case, said:

> p. 411—"Defendant contends here that the verdict is excessive, and against the manifest weight of the evidence. Plaintiff claims that this court is bound by the decisions of the Federal Courts in cases of this kind and has no authority to weigh the evidence. Under Section 56 of the F. E. L. A. Act, plaintiff had the right to sue in a Federal District Court or in a State Court. Miles v. Ill. Cen. R. R. Co., 315 U. S. 698. **Having chosen courts of this State, he must prosecute his action in accordance with our modes of procedure** (Minn. & St. Louis R. R. Co. v. Bombolis, 241 U. S. 211), and we have authority to weigh the evidence to determine whether the verdict should stand or whether it should be set aside and the cause retried. [Chap. 110, Par. 216, sub-par. (3) b, Ill. Rev. Stats.] [Jones' Ill. Stats. Ann., 104,092, subpar. (3) b.] (Corcoran v. City of Chicago, 373 Ill. 567; and Mitchell v. L. & N. R. R. Co., 375 Ill. 545.) **In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, relied upon by plaintiff, suit was filed in a Federal District Court and the case is, therefore, not applicable."** (Emphasis supplied.)

In **Minneapolis & St. L. R. Co. v. Bombolis,** 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595, decided without dissent in 1916, this Court, in holding that States in entertaining actions under the Federal Employers' Liability Act need not provide a jury system other than that established for local negligence actions and that a Minnesota statute per-

mitting a non-unanimous jury verdict in such actions did not violate the Seventh Amendment, first pointed out that such Seventh Amendment applied only to Federal Court proceedings and then said:

241 U. S., at 218, 60 L. Ed., at 963, 964:

> "And it was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress, in the enactment of the employers' liability act, to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute **in accordance with the modes of procedure prevailing in such courts.**" (Emphasis supplied.)

In **Dice v. Akron, C. & Y. R. Co.**, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, a judgment n. o. v. case, the majority opinion by Mr. Justice Black indicates that the majority of this Court did not intend to modify, reverse or retreat from such **Bombolis** case. The minority opinion by Mr. Justice Frankfurter in such **Dice** case points out that (342 U. S., at 365, 96 L. Ed., at 405): "In the thirty-six years since this early decision after the enactment of the Federal Employers' Liability Act, 35 Stat. 65 (1908), the Bombolis case has often been cited by this Court but never questioned," in reaching the conclusion that (342 U. S., at 367, 96 L. Ed. 406) "Although a State must entertain negligence suits brought under the Federal Employers' Liability Act if it entertains ordinary actions for negligence, **it need conduct them only in the way in which it conducts the run of negligence litigation.**" (Emphasis supplied.)

In **Brady v. Southern R. Co.**, 320 U. S. 476, 88 L. Ed. 239, a directed verdict F. E. L. A. case, this Court cited the **Bombolis** case in again pointing out that a state court was not required to provide a Seventh Amendment jury for the trial of F. E. L. A. cases.

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In **Brown v. Gerdes**, 321 U. S. 178, 88 L. Ed. 659, a state court bankruptcy reorganization case involving the right to fix attorney fees, the concurring opinion by Mr. Justice Frankfurter cites the **Bombolis** case and collects the other authorities in reviewing the question here in issue:

321 U. S., at 188-191, 88 L. Ed., at 665-667:

"... In short, subject to only one limitation, each State of the Union may establish its own judicature, distribute judicial power among the courts of its choice, define the conditions for the exercise of their jurisdiction and the modes of their proceeding, to the same extent as Congress is empowered to establish a system of inferior federal courts within the limits of federal judicial power, and the States are as free from control by Congress in establishing state systems for litigation as is Congress free from state control in establishing a federal system for litigation. The only limitation upon the freedom of a State to define the jurisdiction of its own courts is that implied by Article 4, § 2 of the Constitution, whereby 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' ... The matter was well put by Judge Cuthbert Pound in connection with litigation under the Federal Employers' Liability Act in the state courts: 'The State courts must make no hostile discrimination against litigants who come within the act in question; ... they must treat litigants under the Federal act as other litigants are treated; ... they are to act in conformity with their general principles of practice and procedure and are not to deny jurisdiction merely because the right of action arises under the act of Congress.' Murnan v. Wabash R. Co., 246 N. Y. 244, 247, 158 N. E. 508, 54 A. L. R. 1522. ...

"Whether a state court is 'competent to decide rights of the like character and class,' whether the

particular litigation is to be tried by jury and, if so, how the jury is to be composed, whether it is to be a jury of twelve or less, whether decision is to be by unanimity or majority, whether security is to be furnished and of what nature—in sum, whether a state court can take jurisdiction and what the incidents of the litigation should be—all these are matters wholly within the control of the State creating the court and without the power of Congress. See, for instance, Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505. As it was put by Mr. Justice Story in Martin v. Hunter, 1 Wheat. (U. S.) 304, 330, 331, 4 L. Ed. 97, 103, 104, 'Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.' Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that the State has decreed for every litigant who seeks access to its courts. . . .

"The simple fact is that from 1789 to this day no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court."

In **Stein v. New York**, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, a criminal case, this Court, in its majority opinion, again cited the **Bombolis** case in stating that (346 U. S., at 179, 97 L. Ed., at 1539) "The states are free to allocate functions as between judge and jury as they see fit."

In **Brown v. Western Railway of Alabama**, 338 U. S. 294, 94 L. ed. 100, this Court held that a strict local (Georgia)

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rule of pleading could not be invoked so as actually to deprive a F. E. L. A. plaintiff of his right to trial by jury. In **Dice v. Akron, C. & Y. R. Co.**, 342 U. S. 359, 96 L. ed. 398, this Court held that a local (Ohio) rule of practice could not be invoked to deprive a F. E. L. A. plaintiff of his right to have a jury pass on all of the issues of fraud in the procurement of a release.

In **Urie v. Thompson**, 337 U. S. 163, 172, 93 L. ed. 1282, 1294, this Court held that a local (Missouri) rule of practice could not be invoked so as to deprive this Court of its "independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

In the **Urie** case, supra, the Supreme Court of Missouri remanded a state court F. E. L. A. and Boiler Inspection Act case for a new trial (as the Illinois Appellate Court did the instant Boiler Inspection Act cause) and the plaintiff in that case went back to the Missouri Trial Court for a new trial before another jury (a course the Petitioner herein voluntarily elected not to follow). This Court then, on certiorari, reviewed the second appeal to the Supreme Court of Missouri and, in so doing, considered a Federal question presented only on the first appeal, on the ground that the plaintiff could not be **forced** in such first appeal to (p. 172 of 337 U. S., pp. 1293, 1294, of 93 L. ed.) "ask for final judgment to be entered against him on the general negligence issue, and rely solely upon securing review of that judgment and reversal by this Court," in order to preserve his right to have this Court pass upon such Federal question on its review of the second appeal.

In the case at bar the Petitioner chose not to submit to another jury trial (as did the **Urie** case plaintiff), but voluntarily asked for final judgment to be entered against him in the Illinois Appellate Court and relied solely upon se-

curing review and reversal of such final judgment in the Illinois Supreme Court or in this Court.

In the case at bar the Illinois procedure gave the Petitioner herein a new trial **before another jury** and clearly preserved to him his right of trial by jury, and it was **his own voluntary and affirmative act** in causing the Appellate Court to strike out (R. 68) the portion of its judgment remanding this cause for a new trial, **and not Illinois law,** that deprived him of a trial by jury.

Moreover, various members of this Court have joined in pointing out, in varying language, that state courts need conduct F. E. L. A. litigation only in the way in which they conduct the run of other negligence litigation, so long as they treat F. E. L. A. litigants as other non-Federal litigants are treated and make no hostile discrimination against such litigants. "After all, the Federal Courts are always available." (See Minority opinion, **Dice v. Akron, C. & Y. R. Co.,** 342 U. S. 359, 367, 96 L. ed. 398, 406; Concurring opinion, **Brown v. Gerdes,** 321 U. S. 178, 188-191, 88 L. ed. 659, 665-667; Dissenting Opinion, **Brown v. Western Railway of Alabama,** 338 U. S. 294, 299, 300, 94 L. ed. 100, 104.)

The Petitioner herein voluntarily chose and elected to sue in the Illinois Circuit Court and he does not even argue that the Illinois Courts have discriminated against him or treated him in a hostile manner. He has been treated as all other non-Federal litigants are treated and he is not entitled to more than this (Herb v. Pitcairn, 324 U. S. 117, 120, 123, 89 L. ed. 789, 791, 793; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56, 57, 56 L. ed. 327, 349; McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 234, 78 L. ed. 1227, 1229).

It is, therefore, respectfully submitted that the case at bar presents a matter of procedure governed by Illinois

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law (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. 961, 36 S. Ct. 595; Parthun v. Elgin J. & E. Ry. Co. [1945], 325 Ill. App. 408, 60 N. E. [2d] 464, appeal denied 326 Ill. App., xv); and that the writ of certiorari herein should be dismissed.

Such writ of certiorari should be dismissed for the further reason that in **Corcoran v. City of Chicago,** 311 U. S. 610, 85 L. ed. 386, rehearing denied 311 U. S. 727, 85 L. ed 473, this Court squarely recognized that the two identical Illinois Statutes (This Brief, 5, 6) now in issue in this cause presented matters of pure local (Illinois) procedure, by its dismissal of the appeal of such cause, supra, 373 Ill. 567, 27 N. E. 2d 451, "for want of a properly presented substantial Federal question. (See: This Brief, 22-25.)

IV.

Federal Courts of Review Have the Power and Duty to Remand a Cause for a New Trial Where the Verdict of the Jury Is Against the Clear or Manifest Weight of the Evidence.

Counsel for Respondent are of the firm opinion that the case at bar is governed by Illinois law. However, the Federal authorities on the power and duty to grant and remand for a new trial will be discussed in some detail.

It is here to be noted that Petitioner has cited no authorities, Federal or otherwise, on the power and duty of a Federal Court of Review to remand a cause for new trial where the verdict of the jury is against the clear or manifest weight of the evidence.

A. Rule at Common Law.

It is the settled rule of this Court that the Seventh Amendment to the Constitution of the United States ap-

plies only to Federal Court proceedings (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963; Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. ed. 239, 242) and in **Capital Traction Co v. Hof**, 174 U. S. 1, 43 L. ed. 873, this Court defined "Trial by jury" in the following language:

174 U. S., at 13, 14, 43 L. ed., at 877, 878:

> "III. 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books."

In **People v. Traeger**, 372 Ill. 11, 22 N. E. 2d 679, the Illinois Supreme Court defined "Trial by jury" in the following language:

> "The right of trial by jury has been jealously guarded by the courts and there are many decisions in this and other States and in the Federal courts defining the essential elements of a jury trial as guaranteed by constitutional provisions. In **Sinopoli v. Chicago Railways Co.**, supra, this court said: 'The essential thing in the right of trial by jury is the right to

have the facts in controversy determined **under the direction and superintendence of a judge** by twelve impartial jurors having the qualifications and selected in the manner required by law, whose verdict must be unanimous and shall be conclusive, **subject to the right of the judge to set it aside if in his opinion it is against the law or the evidence and to grant a new trial.'** In **People v. Kelly**, supra, we said that the essential elements of a trial by jury were (1) twelve (2) impartial (3) qualified jurors who should (4) unanimously decide the facts in controversy (5) **under the direction and superintendence of a judge.** See **Liska v. Chicago Railways Co.**, 318 Ill. 570; **Lommen v. Minneapolis etc. Co.**, 65 Minn. 196, 68 N. W. 53; **State v. Norton**, 64 N. D. 675, 255 N. W. 787." (Emphasis supplied.)

At the common-law courts of original jurisdiction and courts **exercising appellate jurisdiction** were both authorized to grant a new trial where the verdict of a jury was not supported by the evidence and, for brevity, such authorities are not here repeated (this Brief 23).

B. Power and Duty of Federal Trial Judge.

In **Capitol Traction Co. v. Hof**, supra, 174 U. S. 1, 13, 14, 43 L. ed. 873, 877, 878, this Court said that the Trial Judge was empowered to set aside the verdict of the jury "if in his opinion it is against the law or the evidence," and in **Montgomery Ward & Co. v. Duncan**, 311 U. S. 243, 251, 85 L. ed. 147, 153, 61 S. Ct. 189, it is said that the "motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence . . ." Rule 59, Fed. Rules Civ. Proc., provides that Federal Trial Courts may grant a new trial "for any of the reason for which new trials have heretofore been granted in actions at law in the courts of the United States."

The Federal Courts have consistently and uniformly held (**Charles v. Norfolk & Western Ry. Co.**, 7 Cir., 1951, 188 F. 2d 691, 695, certiorari denied 342 U. S. 831, 72 S. Ct. 55, 96 L. ed. 628; **Daffinrud v. United States**, 7 Cir., 1944, 145 F. 2d 724, 725; **Aetna Casualty Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, 352-354; **General Accident, Fire & Life Assur. Corp. v. Dickinson**, D. C. N. D. Cal., N. D., 1945, 61 F. Supp. 153, 156; **Kaufman v. Atlantic Greyhound Corp.**, D. C. S. D. W. Va., 1941, 41 F. Supp. 252, 254) that Rule 59 makes it the duty of the Federal Trial Judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict.

The above-cited case of **Aetna Casualty & Surety Co. v. Yeatts**, 4 Cir., 1941, 122 F. 2d 350, is apparently the leading Federal case on the power and duty of the Federal Court Trial Judge to grant a new trial where the verdict of the jury is against the clear weight of the evidence. For this reason and the further reason that the Petitioner's Brief herein cites and discusses "directed verdict" law instead of "new trial" law, we will quote the following from this most pertinent decision:

> pp. 352-353—"The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is

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one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L. R. A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B. N. C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra (178 Pa. 481, 36 A. 298), as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice—a power exercised in pursuance of a sound judicial discretion, **without which the jury system would be a capricious and intolerable tyranny,** which no people could long endure. This court has had occasion more than once recently to say that it was **a power the courts ought to exercise unflinchingly.**' (Emphasis suppplied.)"

The Court then exhaustively reviewed the authorities, tracing the history of the above power back to 1665 and to the Magna Charta, and then quoted the language it later quoted in **Snead v. New York Central Railroad Company**, 216 F. 2d 169, 172 (this Brief 34-35).

The **Yeatts** case, supra, 122 F. 2d 350, has been uniformly followed on the rule that the Federal Trial Judge has the duty to set aside a verdict and grant a new trial where such verdict is against the clear weight of the evidence, even though there may be substantial evidence which would prevent the direction of a verdict. See:

Dyer v. MacDougall, 2 Cir., 1952, 201 F. 2d 265, 271, 272, in concurring opinion of Frank J., in pointing

out distinction between rules governing "directed verdicts" and "new trial," particularly on the judging of the "credibility" of witnesses.

Dickerson v. Franklin Nat. Ins. Co. of New York, 4 Cir. 1942, 130 F. 2d 35 (Parker, J.) judgment n. o. v. under F. R. C. P. 50 (b) can be granted (p. 37) "only where the motion for directed verdict should have been allowed";

Hawkins v. Sims, 4 Cir., 1943, 137 F. 2d 66 (Per Curiam)—points out above distinction between rules on 'directed verdict' and on 'new trial'; and that judgment n. o. v. cannot be granted (p. 67) "except where motion for directed verdict has been made, and then only where the motion for directed verdict should have been granted, i. e., where there is no substantial evidence to support the verdict";

Railway Exp. Agency v. Mallory, 5 Cir., 1948, 168 F. 2d 426, 427—stating rule on "directed verdicts" and "judgment n. o. v.," **Dissenting opinion** by Sibley, J., reviews common law rule, as stated in prior Federal cases, on power and duty of Trial Judge to grant a new trial **even on his own motion** and on remand by court of review where he fails so to act in a proper case;

Reno Sales Co. v. Pritchard Industries, 7 Cir., 1950, 178 F. 2d 279, 281—states rule on motion for directed verdict;

Atlantic Greyhound Corporation v. Eddins, 4 Cir., 1949, 177 F. 2d 954, 955—states rule on reviewing jury verdict approved by Trial Judge;

General American Life Ins. Co. v. Central Nat. Bank, 6 Cir., 1943, 136 F. 2d 821, 822—quotes **Montgomery Ward & Co. v. Duncan**, 311 U. S. (page 251), 61 S. Ct., page 194, 85 L. Ed. 147, on function of motion for new trial, distinguishes between such

motion and a motion for directed verdict and states party is entitled to Trial Judge ruling on both motions.

C. Power and Duty of Federal Reviewing Court.

The foregoing authorities conclusively establish the principle of law that a Federal Court trial judge has the power and **absolute duty** to award a new trial where the verdict of the jury is against the clear weight of the evidence, as the Illinois Appellate Court has held to be the case in this cause (R. 18, 19, 351 Ill. App. 283, 114 N. E. [2d] 898).

The next question presented is: Does a Federal Reviewing Court have the power to reverse and remand for a new trial where such Federal Court trial judge has failed and refused to perform his absolute duty to grant a new trial?

This question was answered in the affirmative by the Fourth Circuit Court of Appeals in the case of **Virginian Ry. Co. v. Armentrout** (1948), 166 F. 2d 400. In that case such court, speaking through Judge Parker, first pointed out that this was the second appeal (p. 401) "in the distressing case of the infant whose hands and portions of whose arms were cut off by a backing locomotive" and that in the first appeal it had awarded a new trial (p. 401) "for errors in the charge of the court." (See 158 F. 2d 358.)

The court then discussed the facts to show that an award of $160,000 to a child who was 13 months old at the time of injury was excessive, reviewed (p. 408) the authorities on the well-established power and duty of the trial judge to grant a new trial and then said:

> pp. 408-409—"The power of this court to reverse the trial court for failure to exercise the power, where

such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under Section 22 of the Judiciary Act of 1789, 28 U. S. C. A. No. 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, **in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion.** In a situation of that sort, **reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence.** Whether there has been an abuse of discretion **is a question of law in the one case, just as is the legal sufficiency of the evidence in the other.** An Appellate court **is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.** . . ." (Emphasis supplied.)

"That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: Detroit Transfer Co. v. Pratt, 6 Cir., 2 F. 2d 193; Carter Coal Co. v. Nelson, 4 Cir., 91 F. 2d 651, 654; Western Union Tel. Co. v. Dismang, 10 Cir., 106 F. 2d 362, 364; Southern Fruit Distributors v. Fulmer, 4 Cir., 107 F. 2d 456, 459. In the case of Carter Coal Co. v. Nelson, supra (91 F. 2d 654), this court, speaking through Judge Soper, said: 'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and **it is only when there is an abuse of such discre-**

tion that its action is reviewable.' (Emphasis supplied.)"

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

In **Commercial Credit Corp. v. Pepper** (1951), 187 F. 2d 71, the Fifth Circuit Court of Appeals followed the **Virginian Ry. Co.** case, supra, 166 F. 2d 400, in reversing and remanding for a new trial, and in the course of its opinion said:

pp. 75-76—"Under the circumstances presented, and quite independent of the error in the charge, we are of opinion that the trial court erred in denying plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion,' however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interest of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error.

"Upon the record before us, we hold that it was an abuse of discretion to deny plaintiff's motion for a new trial."

The other courts of appeal have also uniformly followed such **Armentrout** case, supra, 166 F. 2d 400, on the proposition and rule that the Federal Appellate Courts have the power and duty to set aside verdicts and order new trials where the Federal Trial Judges have abused their discretion in not granting such new trials. See:

Southern Pac. Co. v. Guthrie, 9 Cir., 1949, 180 F. 2d 295, 303, 306—on rehearing, 9 Cir., 186 F. 2d 926, **certiorari denied**, 341 U. S. 904, 71 S. Ct. 614, 95 L. ed. 1343—**F. E. L. A. case**—$100,000 verdict for plaintiff not so grossly excessive as to constitute abuse of discretion—**See** p. 305 on faulty reasoning on historical limitation of writ of error to matters within record, of which the motion for a new trial was not a part;

Boyle v. Bond, App. D. C. 1950, 187 F. 2d 362, 363—reversed for new trial, if no remittitur filed, because excessive verdict "technically, constituted an abuse of discretion amounting to an error of law";

Sunray Oil Corporation v. Allbritton, 5 Cir., 1951, 187 F. 2d 475—**see extended dissenting opinion** (right to order remittitur of excessive verdict) **rehearing denied**, 188 F. 2d 751—**see** extended dissenting opinion;

Mayer v. Higgins, 7 Cir., 1953, 208 F. 2d 781, 783;

and there are many other cases announcing such proposition and rule wherein this Court has denied certiorari. See:

Charles v. Norfolk & Western Ry. Co., 7 Cir., 1951, 188 F. 2d 691, 695, **certiorari denied** 342 U. S. 831, 96 L. ed. 628, 72 S. Ct. 55;

Somerville v. Capital Transit Co., App. D. C. 1951, 192 F. 2d 413, 414, 415, **certiorari denied**, 342 U. S. 941, 96 L. ed. 700, 72 S. Ct. 553;

Rash v. Peoples Deposit Bank & Trust Co., 6 Cir., 1951, 192 F. 2d 470, 471, **certiorari denied**, 343 U. S. 909, 96 L. ed. 1326, 72 S. Ct. 639;

Bucher v. Krause, 7 Cir., 1953, 200 F. 2d 576, 585-587—(Court has right to review discretion of trial judge on **excessive verdict**—points out old "procedural" impediment no longer bars judicial re-

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view), **certiorari denied,** 345 U. S. 997, 97 L. ed. 1404, 73 S. Ct. 1141, **rehearing denied,** 346 U. S. 842, 98 L. ed. 363, 74 S. Ct. 17;

Southern Pac. Co. v. Guthrie, 9 Cir., 1949, 180 F. 2d 295, 303-306, on rehearing, 9 Cir., 186 F. 2d 926, **certiorari denied,** 341 U. S. 904, 71 S. Ct. 614, 95 L. ed. 1343;

Fishbaugh v. Armour & Co., 4 Cir., 1950, 185 F. 2d 541, 542, certiorari denied 342 U. S. 914, 96 L. ed. 683, 72 S. Ct. 361, **rehearing denied,** 342 U. S. 950, 96 L. ed. 706, 72 S. Ct. 563.

Such rule and principle has been applied by the Courts of Appeal in determining whether such verdicts **were against the clear weight of the evidence (De Pascale v. Pennsylvania R. Co.,** 3 Cir., 1950, 180 F. 2d 825, 826, **F. E. L. A.** case—action of Trial Judge in denying new trial to **employee** affirmed; **Wisnewski v. Baltimore & Ohio R. Co.,** 3 Cir., 1950, 186 F. 2d 538, 541 (pedestrian case); **Norfolk Southern Ry. Co. v. Davis Frozen Foods,** 4 Cir., 1952, 195 F. 2d 662, 664—(suit against truck company for damage done to railroad bridge); Kirstner v. Atlantic Greyhound Corp., 4 Cir., 1951, 190 F. 2d 422, 423).

Even some of the authorities cited and quoted by the Petitioner in his Petition for Writ of Certiorari in this Court support the power of the Court of Appeals to remand for a new trial, for in the cited case (Pet. 14) of **Witherbee v. Elgin, Joliet & Eastern Ry. Co.** (1951), 191 F. 2d 302, the Seventh Circuit Court of Appeals remanded a F. E. L. A. case for a new trial, and in the cited case (Pet. 14) of **Stanczak v. Pa. Ry. Co.** (1949), 174 F. 2d 43, the same Court refused to grant a new trial in a F. E. L. A. and Safety Appliance Act case because there was no abuse of discretion by the Federal Trial Judge. And in the cited case (Pet. 14, 16) of **Grand Trunk Western Ry. Co. v. Heatlie** (1931), 48 F. 2d 759, the Sixth Circuit Court of Appeals also denied a new trial because there

was no abuse of discretion. The last-named **Heatlie** case is also cited at page 17 of Petitioner's Brief on Merits.

In **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181, this Court said that the granting or denying of a new trial for error of fact "is a matter within the discretion of the trial court," reviewable only by this Court and the Circuit Courts of Appeal for a plain abuse of such discretion. And in **United States v. Johnson**, 327 U. S. 106, 90 L. ed. 562, this Court, speaking through Mr. Justice Black, said, **327 U. S. at 111, 112, 90 L. ed. 565, 566:**

> ". . . But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. Ct. 588, 19 Ann. Cas. 778; Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 S. Ct. 2, 20 Ann. Cas. 1138; Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 481, 77 L. ed. 439, 443, 53 S. Ct. 252. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 247, 84 L. ed. 1129, 1180, 60 S. Ct. 811; Glasser v. United States, 315 U. S. 60, 87, 86 L. ed. 680, 708, 62 S. Ct. 457, it should never do so where it does not clearly appear that the findings are not supported by any evidence. . . ."

The finding of the Trial Court on the existence of a defective retriever is "not supported by any evidence," as shown by the following language from the opinion of the Illinois Appellate Court (R. 18, 19):

> ". . . the evidence shows that the retriever operated normally before and after the incident com-

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plained of. In order for the retriever to have retrieved the trolley pole when it jumped the line going to the depot, it must have been in good working order; again, when the motorman reset the retriever and placed the pole on the hook before the return trip to Alton, the retriever operated normally. These facts to be gathered from plaintiff's evidence, in our view, appear more favorable to the defendant than to the plaintiff. The evidence further showed that what happened to plaintiff on this occasion had happened to him and to others from time to time without the retriever having been defective. The burden rested on plaintiff to show that on this occasion a defect existed and that it proximately caused his injury. With respect to the alleged defect, it is clear from all the evidence that this burden of proof was not satisfied. The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident and by the other evidence in the record. It is, therefore, our conclusion from all the evidence that the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence. Robertson v. Louisville & N. R. Co., 327 Ill. App. 44, 63 N. E. (2nd) 608. . . . ."

In **Chicago G. W. R. Co. v. Rambo,** 298 U. S. 99, 80 L. ed. 1066, rehearing denied, 298 U. S. 692, 80 L. ed. 1409, a suit under the Federal Boiler Inspection Act (45 U. S. C. A., Sec. 23), based on the alleged failure of the defendant railroad to equip its locomotive with a headlight of the illuminating power required by Federal law, i. e.: a rule of the Interstate Commerce Commission, this Court reversed a judgment in favor of the plaintiff administratrix, because the evidence showed that such headlight worked properly and complied with said I. C. C. rule both **before** and **after** the accident and death there in issue. In reach-

ing its decision in that case this Court first quoted the appraisal of the evidence made by the Supreme Court of Minnesota in reaching its conclusion that the jury was justified "in finding that the headlight did not comply with the requirements of the Federal Boiler Inspection Act," which evidence showed "before" and "after" operation of said headlight, and then said, **298 U. S. at 102, 80 L. ed. at 1069:**

> "This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture. Atchison, T. & S. F. R. Co. v. Saxon, supra (284 U. S. 460, 76 L. ed. 399, 52 S. Ct. 229). . . ."

Under the authority of this decision of this Court the Illinois Appellate Court would have been justified, as a matter of Federal law, in reversing the Trial Court and entering judgment n. o. v. in favor of the Respondent railroad, as is hereinafter argued (This Brief 60, 63).

And if Federal law and the decisions of this Court, and not Illinois law as Respondent contends, controlled the right of the Illinois Appellate Court to remand this cause for a new trial before another jury, then such **Rambo** case, supra, 298 U. S. 99, 80 L. ed. 1066, 56 S. Ct. 693, shows the "plain abuse of discretion" and finding of fact "wholly unsupported by evidence" (United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 247, 248, 84 L. ed. 1129, 1180, 1181; United States v. Johnson, 327 U. S. 106, 111, 112, 90 L. ed. 562, 565, 566) required under the rule of this Court to give such Illinois Appellate Court the right to intervene and remand for such new trial.

D. Federal Rule and Illinois Rule Are Same.

Finally, we invite the attention of this Court to **Jennings v. Murphy** (1952), 194 F. 2d 35, wherein the Seventh Circuit Court of Appeals, in pointing out that the Federal rule and the Illinois rule governing the appellate review of orders granting or refusing new trials were the same, said:

> p. 38. ". . . Furthermore, granting or refusing a motion for a new trial rests within the sound discretion of the trial court and its ruling in this respect can not be disturbed on appeal in the absence of a showing of a manifest abuse of such discretion. There being, we think, absence of clear abuse of discretion, the judgment must be affirmed. Firestone Tire & Rubber Co. v. Nollman, 5 Cir., 107 F. 2d 146; Fyre v. Lyon, 55 App. D. C. 48, 299 F. 926. **The same rule abides in Illinois where this accident occurred and where the case was tried.** Couch v. Southern Railway, 294 Ill. App. 490, 14 N. E. 2d 266; Corcoran v. City of Chicago, 373 Ill. 567, 27 N. E. 2d 451." (Emphasis supplied.)

We ask this Court to note that in the Couch case, supra, 294 Ill. App. 490, 14 N. E. (2d) 266, the very same Fourth District Appellate Court reviewed and affirmed the order of the City Court of East St. Louis granting a new trial to the plaintiff in a death action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51).

It is, therefore, respectfully submitted that if this Court is of the opinion that Federal law governs and controls this cause the Illinois Appellate Court had the clear right, power and duty to remand this cause for a new trial before another jury; and that the writ of certiorari herein should be dismissed or, in the alternative, the judgment of the Illinois Appellate Court should be affirmed.

V.

This Court Should Not Review the Findings of Fact Made by the Illinois Appellate Court. Such Findings, If Reviewed, Should Be Affirmed.

The Petitioner devotes pages 20-23 of his Brief on Merits to arguing that this Court, in the exercise of its supervisory powers on certiorari, should examine and weigh the evidence and reverse the finding of the Illinois Appellate Court that the verdict of the jury was against the manifest or clear weight of such evidence; and that Respondent was, therefore, entitled to a new trial before another jury.

To support this contention Petitioner again cites (Pet. Br. 24) **Lavender v. Kurn**, 327 U. S. 645, 90 L. Ed. 916, and **Tennant v. Peoria & Pekin Union Railway Co.**, 321 U. S. 29, 35, 88 L. Ed. 520, and refers this Court to other "quotations to this effect—not repeated for the sake of brevity." However, as said by the Illinois Appellate Court in its Supplemental Opinion in the case at bar (R. 21), "All of these cases deal with the questions of directed verdicts or judgments notwithstanding the verdicts and not with the reversal and remandment on the ground of a verdict against the manifest weight of the evidence," and Petitioner has cited no decisions of this Court holding that it has the right or duty to review and weigh such evidence and to reverse such findings of fact.

In **Chicago G. W. Ry. Co. v. Rambo**, 298 U. S. 99, 80 L. Ed. 1066, 56 S. Ct. 693, rehearing denied 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 945, heard on certiorari to the Supreme Court of Minnesota, this Court held that it would, on reviewing the judgment of a state court in an action under the F. E. L. A. (45 U. S. C. A., Secs. 51-59) and the Federal Boiler Inspection Act (45 U. S. C. A., Secs. 22-34), examine the record and determine for itself whether, **as a**

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matter of law, there was enough to sustain a finding of negligence and to justify the submission of such cause to a jury.

See also: **Chicago, M. & St. P. R. Co. v. Coogan,** 271 U. S. 472, 474, 70 L. Ed. 1041, 1044, reversing a judgment against defendant F. E. L. A. carrier.

In the very recent case of **Bonnier v. C. B. & Q. R. R. Co.** (1954), supra, 2 Ill. 2d 606, the Illinois Supreme Court, in reversing a judgment n. o. v. entered by the First District Appellate Court in favor of the defendant railroad in a F. E. L. A. case, extensively quoted (pp. 610-611) a Federal case (**Louisville and Nashville Railroad Co. v. Botts,** 8 Cir., 1949, 173 F. 2d 164, 166, 167) reviewing the decisions of this Court defining the right and power of trial and appellate courts, both Federal and State, to take F. E. L. A. cases from juries by means of directed verdicts and judgments n. o. v. and, in the course of its opinion, said:

> pp. 607-608—"The well-established rule in both the Federal courts and the courts of Illinois is that a motion for judgment notwithstanding the verdict presents **only a question of law** as to whether, when all the evidence is considered, together with all reasonable inferences therefrom in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case (**Wilkerson v. McCarthy,** 336 U. S. 53, 93 L. Ed. 497; **Lindroth v. Walgreen Co.,** 407 Ill. 121; Ill. Rev. Stat. 1951, chap. 110, par. 259.22). Section 1 of the Federal Employers' Liability Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' Other provisions of the act abolish the defense of assumption of risk and provide that contributory negligence of a plaintiff shall not bar a recovery (45 U. S. C. 51, 53, and 54).

> Thus, the sole question presented on appellate review [by the Illinois Supreme Court] is whether there is any evidence, considered in the light most favorable to the plaintiff, that defendant was guilty of negligence which contributed in whole or in part to plaintiff's injury."

Respondent does not deny the right and duty of this Court to examine the facts and to weigh the evidence to determine whether a trial or appellate court, federal or state, has deprived a F. E. L. A. or Federal Boiler Inspection Act plaintiff of a substantial Federal right. Respondent does contend that this Court, under its settled rules (United Gas Public Service Co. v. Texas, 303 U. S. 123, 139, 143, 82 L. Ed. 702, 714, 715, 716, 717; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. Ed. 735, 740; Chrisman v. Miller, 197 U. S. 313, 319, 49 L. Ed. 770, 772; Young v. Ragen, 337 U. S. 235, 238, 93 L. Ed. 1333, 1336; Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. Ed. 1433, 1435; Great Northern R. Co. v. Donaldson, 246 U. S. 121, 124, 62 L. Ed. 616, 619; Milk Wagon Drivers U. v. Meadowmoor Dairies, 312 U. S. 287, 294, 85 L. Ed. 836, 841, 842; Norton Co. v. Department of Revenue, 340 U. S. 534, 538, 95 L. Ed. 517, 521), will not review non-Federal questions of fact or matters of state procedure, but will accept the conclusions of the state tribunal as final.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds," [for the reason that this Court's] "only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights" (Herb v. Pitcairn, 324 U. S. 117, 125, 89 L. Ed. 789, 794).

Section 92 (3) (b) of the Illinois Civil Practice Act* (Ill. Rev. Stat. 1953, ch. 110, par. 216) specifically provides that

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* Quoted page 6 of this Brief.

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the findings of fact of the Appellate Court on the weight of the evidence, in law actions, shall be final and binding on the Illinois Supreme Court, and such Court has squarely held that in law actions brought to it by appeal from the Appellate Court it "is restricted to re-examination as to questions of law only" (**Mabee v. Sutliff & Case Co.**, 404 Ill. 27, 32). (Accord: **Olson v. Chicago Transit Authority** [1953], 1 Ill. 2d 83, 89, 115 N. E. [2d] 301.)

If, however, this Court is of the opinion that it is not bound by the above Illinois statute and has powers of review not possessed by the Illinois Supreme Court and elects to review the facts in this cause, Respondent submits that the findings of the Illinois Appellate Court are correct as a matter of law and should be affirmed on the authority of Chicago G. W. R. Co. v. Rambo, 298 U. S. 99, 80 L. Ed. 1066, rehearing denied 298 U. S. 692, 80 L. Ed. 1409.

Moreover, Petitioner, to sustain a portion of his Argument in this Court (Pet. Br. 20-23), has ignored or evaded the findings of the Illinois Appellate Court, and has only partially quoted the Record in this cause.

The Illinois Appellate Court said, in pertinent part (R. 19), "The inference of a defect arising from plaintiff's circumstantial evidence is manifestly outweighed by the showing that the retriever worked normally before and after the incident **and by the other evidence in the record**" (emphasis supplied). Some of the "other evidence in the record," ignored by Petitioner, is the testimony of the Petitioner (R. 43, 44) and of two other employees (R. 53, 58) that, as found by the Illinois Appellate Court (R. 18), "what happened to plaintiff on this occasion had happened to him and to others from time to time **without the retriever having been defective**" (emphasis supplied). Also omitted by the Petitioner is the **complete** pertinent

questions asked of and answered by his alleged mechanical engineer on cross-examination, as follows (R. 52):

> Q. And were the springs broken?
>
> A. No, sir.
>
> Q. Now, **if any of these things you call mechanical defects were in operation in this particular mechanism would it work normally and operate normally,** if this particular thing you testified about, if the paw were worn and springs broken, would it work normally at all?
>
> A. No, sir. (Emphasis supplied.)

Also omitted by the Petitioner (Pet. Br. 21) is the **full** pertinent testimony of the Petitioner, himself, as it appears at Record page 44, as follows:

> After the passengers were discharged Mr. Elder pulled out the trolley and [fol. 75] pulled it underneath the hook and when he pulled it out he evidently set it. It doesn't necessarily have to be set when you put it under the hook. I presume he did reset it. I saw him pull it out.

Added by the Petitioner in his Statement of the Case is the following (Pet. Br. 8):

> Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

This statement is wholly untrue, as pages 55-59 of the Record will show. Mr. Elder, on this issue, actually testified as follows:

> (R. 58)—The retriever has not jerked me in the course of resetting it and pulling it and I have set the retriever more than the conductors have.

Raymond Phillips, another employee, testified as follows:

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(R. 53)—I have had occasion in my work to work with retrievers and trolleys. I am familiar with the normal operation of them and I have had occasion to be holding on the rope on the trolley and have it retrieve. I weigh about 150 pounds. When you are holding on the rope, if you are not careful, it will carry you right in. I would just as soon let loose of that rope if I am not able to hold it. I am able to hold it if I put a stout grip on it; in other words, if I break myself.

James LeRoy Green, another conductor, testified that (R. 61):

> I have had occasions when those retrievers have tripped. They have quite a bit of tingle of the springs, I have had them pull me in before I could let go.

It is significant that even in his Statement of the Case (Pet. Br. 4-9), which he is duty-bound to present fairly and accurately, Petitioner does not state any of the above facts showing that a **normal** retriever will retrieve if it is not properly handled while being set for, as Petitioner himself testified (R. 43), "I knew the normal operation of the retriever, and if you pull the rope out real quickly it would trip, it has happened to me that by pulling out the rope real fast that it trips on me. . . . This particular experience that I have had has happened on other streetcars besides car 123 and with other retrievers."

The only evidence in this cause that even remotely touches on a possible defect in the retriever is Petitioner's unsupported statement that (R. 32)—"I let the rope back into the retriever because the pole was up and when I got the pole down to where I could set it on the wire, and **for some reason it caught and rewound** and when it did it yanked me in between the cars" (emphasis supplied).

Respondent, therefore, submits that, if this Court reviews the weight of the evidence in this cause, it should adopt the finding of the Illinois Appellate Court that (R. 19) "the jury finding of a violation of the Boiler Inspection Act is clearly against the manifest weight of the evidence" and affirm the now final judgment of that Court.

VI.

The Right of Physical Examination of a Plaintiff Is a Substantial Federal Right.

The right of a defendant to require a plaintiff in a personal injury suit to submit to a physical examination prior to trial is a substantial right and this court, in promulgating Federal Rule of Civil Procedure 35, has given this valuable right to Federal Court defendants. Illinois, however, denies such right of physical examination (**C. R. I. & P. Ry. Co. v. Benson**, 352 Ill. 195, 185 N. E. 244).

Respondent moved (R. 25-28) the Illinois Trial Court for a physical examination of Petitioner, as provided by said Rule 35, and its motion, as amended, was denied (R. 26). The Illinois Appellate Court affirmed (R. 19, 20) such Trial Court ruling on the ground that (R. 20) "The granting to State Courts of concurrent jurisdiction in F. E. L. A. cases does not require that a federal rule supplant the procedural law of a state."

If this Court should determine that the Illinois Appellate Court has deprived Petitioner of a substantial Federal right in remanding this cause for a new trial before another jury, a Federal procedural matter under said F. R. C. P. 59 and Federal law, then it should also determine that such Court deprived Respondent of a substantial Federal right in denying its motion, as amended, for a physi-

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cal examination of Petitioner and, if it remands this cause for a new trial, should grant to Respondent the right to a physical examination of Petitioner, as provided by F. R. C. P. 35.

CONCLUSION.

It is respectfully submitted that the writ of certiorari herein should be dismissed or, in the alternative, that the now final judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted,

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